



# PUBLIC NOTICE

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Federal Communications Commission  
445 12th St., S.W.  
Washington, D.C. 20554

News Media Information 202 / 418-0500  
Fax-On-Demand 202 / 418-2830  
TTY 202 / 418-2555  
Internet: <http://www.fcc.gov>  
<ftp.fcc.gov>

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## DEADLINE FOR NCE SETTLEMENTS AND SUPPLEMENTS EXTENDED TO JULY 19, 2001; DATE FOR CALCULATING COMPARATIVE QUALIFICATIONS REMAINS JUNE 4, 2001

### MASS MEDIA BUREAU PROVIDES EXAMPLES OF APPLICATION OF NCE SECTION 307(b) CRITERIA

By this Public Notice, the Mass Media Bureau provides additional information regarding the processing of pending closed group applications for reserved channel noncommercial educational ("NCE") broadcast stations.<sup>1</sup>

**Settlement and Supplement Deadline Extended but Date for Determining Qualifications Unchanged:** The Bureau previously issued a Public Notice announcing a deadline of June 4, 2001 by which applicants in closed groups of NCE broadcast applications must file either settlements/minor technical amendments to resolve application conflicts, or supplements to claim points under the new NCE comparative standard. See Public Notice, DA 01-729 (March 22, 2001). That Public Notice also established June 4, 2001 as the date on which applicants' comparative qualifications would be generally fixed. On May 11, 2001, seven NCE organizations (collectively "Joint Petitioners") filed a joint motion for extension of time with the Commission.<sup>2</sup> The Joint Petitioners request a 45-day extension of the settlement/supplement deadline to July 19, 2001 to provide additional time to negotiate and file settlement requests. However, to avoid any potential unfairness to applicants, the joint motion proposes that June 4, 2001 remain the date for determining comparative qualifications, such as whether applicants qualify for points as established local entities.

We find that an extension of the June 4, 2001 deadline is warranted. First, Joint Petitioners report that software developers are still in the process of incorporating data from the 2000 Census into programs that calculate populations within proposed station service areas. They state that without updated software, it is difficult for NCE applicants to assess the comparative strength of competing applications. Second, they note that on May 4, 2001 the Bureau released an *Errata* which added 16 applicants to various settlement groups. The Joint Petitioners also describe several unforeseen difficulties in initiating settlement agreements. In a number of cases application contacts have changed. In others,

<sup>1</sup> Currently pending are several petitions for reconsideration of Memorandum Opinion and Order, Reexamination of Comparative Standards for Noncommercial Educational Applicants, MM Docket 95-31. The procedures outlined herein are without prejudice to any action the Commission may take on reconsideration.

<sup>2</sup> The Joint Petitioners are Station Resource Group, Educational Media Foundation, National Public Radio, CSN International, the National Federation of Community Broadcasters, Positive Alternative Radio, Inc. and Calvary Chapel of Twin Falls, Inc. We also received supporting comments from California State University at Sacramento, Lane Community College, Mohave Community College, the University of Kansas, WVTF Public Radio, Virginia Tech Foundation, Bridge Broadcasting, Central Florida Christian Radio, Howell Mountain Broadcasting, LifeTalk Broadcasting, the Mary V. Harris Foundation, Southern Idaho Corporation of Seventh-day Adventists, and the Upper Columbia Media Association.

obtaining various required approvals from college administrators and public officials has proven difficult within the time frame established for this purpose.

Accordingly, we announce that we will accept settlements, engineering solutions, and point supplements through July 19, 2001. We also extend until July 19, 2001 the period during which we will allow settlements that propose payments in excess of expenses. We believe that these extensions will provide needed additional time to complete settlement agreements without unduly delaying the processing of remaining applications. However, we will not adopt a suggestion of several commenters who support the joint motion, to extend the period for filing settlements involving payments in excess of expenses to August 20, 2001. We believe that it would be inappropriate to permit settlements in excess of expenses beyond the deadline for filing comparative supplements. Such an extension would defeat the Commission's underlying purpose for providing that extraordinary relief - - to provide an incentive to settle and to make unnecessary the filing and consideration of point supplements. Accordingly, settlements filed after July 19, 2001 will be subject to the monetary limits in our rules.

In sum, applicants will have an extra 45 days, until July 19, 2001, to negotiate settlements that exceed expenses. In the event that settlement negotiations fail, applicants must file supplements with a June 4, 2001 "snap shot" date for determining an applicant's maximum non-technical qualifications, as announced previously. Thus, applicants filing supplements on July 19, 2001, may not claim non-technical points in excess of those for which they would have qualified on June 4, 2001. Also remaining unchanged are the dates set by the Commission in paragraph 31 of the Memorandum Opinion and Order in this proceeding for comparing technical proposals.

**Application of NCE § 307(b) Criteria:** In cases where mutually exclusive NCE applications specify different communities, the Commission must first consider whether to award a decisive § 307(b) preference. 47 C.F.R. § 73.7002(b); Report and Order, MM Docket 95-31, 15 FCC Rcd 7386, 7397-98 (2000). An NCE applicant will be eligible for the preference if it will provide a first or second NCE aural service (in the aggregate) to 10 percent of the people within the proposed station's 60 dBu contour, provided that the number of people receiving such service is at least 2,000. Id. If two or more applicants meet this standard, the applicant providing the greatest number of people with the highest level of service will be awarded a construction permit, if it will provide such service to at least 10 percent of the people within the station's 60 dBu contour and to at least 5,000 more people than the next best applicant. Id. First service will be preferred over second service. Id. Thus, the Commission will first examine the applicants' first service levels alone to determine whether one of the proposals is superior and should receive a decisive preference. If such applicants are equivalent with respect to first service alone, the Commission will compare proposals by aggregating new first and second service population totals. Applicants providing equivalent service overall will be considered under the point system, while any applicants not deserving a § 307(b) preference or deserving a lesser § 307(b) preference than the next best applicant will be dismissed. Id. The Mass Media Bureau has prepared the following examples to clarify the Commission's application of these new criteria.

Contacts: Irene Bleiweiss 418-2700 (legal); Edward P. De La Hunt 418-2700 (engineering).

## Examples

In each example applicants propose to serve different communities. All mutually exclusive applicants are identified. Assume that each applicant's 60 dBu contour encompasses 40,000 people, making the 10% threshold for each applicant equal to 4,000 people (which exceeds the 2,000 minimum).

### **EXAMPLE 1:**

**PRINCIPLE ILLUSTRATED:** Standard analysis, including aggregation as part of second service analysis when first service alone is not dispositive.

	Community 1/Applicant A	Community 2/Applicant B
First Service	4,000	7,000
Second Service	5,000	7,500

**ANALYSIS:** Applicant B is selected pursuant to § 307(b). A and B are both eligible for consideration under § 307(b) because each provides a new first or second service to 10% of the population within their respective service areas. Both applicants are entitled to a first service preference. However, B would not provide a new first service to at least 5,000 more persons than would A, and thus is not entitled to a comparative preference. Next, we consider whether A or B would provide total first or second service to 5,000 more people than the other applicant. A would provide a first or second service to 9,000 people (4,000 plus 5,000). B would provide a first or second service to 14,500 people (7,000 plus 7,500). B is superior to A because B is providing first or second service to at least 5,000 more people than A, in this example 5,500 more people ( $14,500 - 9,000 = 5,500$ )

### **EXAMPLE 2:**

**PRINCIPLES ILLUSTRATED:** An applicant meeting the 10% minimum new service threshold prevails over an applicant that does not. In such circumstances, the prevailing applicant need not satisfy the 5,000 person differential threshold. A first service preference will prevail over a second service preference of any magnitude.

	Community 1/Applicant A	Community 2/Applicant B
First Service	4,750	3,000
Second Service	5,000	15,000

**ANALYSIS:** Applicant A receives a decisive § 307(b) preference. Applicants A and B are both eligible for consideration under § 307(b) because each provides a new first or second service to 10% of the population within their respective service areas. First service is compared, and Applicant A is the only applicant to meet the minimum new first service threshold. B does not qualify for a first service preference because it does not propose to provide a first service to at least 4,000 people (i.e. 10% of the people within its 60 dBu contour). Because B does not qualify for a first service preference, A's first service need not exceed B's first service by 5,000. Because Applicant A prevails under the first service criterion, no second service analysis is undertaken.

### **EXAMPLE 3:**

**PRINCIPLE ILLUSTRATED:** Point system applies to § 307(b)-preferred but materially equivalent applicants.

Assume five applicants A through E each serving a different community:

	A	B	C	D	E
First Service	100	6,000	20,000	20,250	21,000
Second Service	20,000	15,000	0	5,000	4,000

**ANALYSIS:** Applicants D and E will be considered under the point system. All applicants are eligible for consideration under § 307(b) since all provide first or second service to 10% of the people within their respective 60 dBU contours. First service is compared and A is eliminated because it does not meet the minimum NCE § 307(b) first service threshold ( $10\%/2,000$  people). B also is eliminated, because its first service is inferior (by at least 5,000 people) to the next best applicant, C ( $20,000 - 6,000 = 14,000$ ). C, D, and E proceed to second service consideration. C is eliminated because it provides total first or second service that is inferior by at least 5,000 people to the first or second service provided by the next best applicant, E ( $25,000 - 20,000 = 5,000$ ). D and E will be considered under the point system because they provide materially equivalent first and second service.

### **EXAMPLE 4:**

**PRINCIPLE ILLUSTRATED:** For purposes of comparing a group of three or more applicants, equivalency is determined by comparing each applicant to the applicant proposing the next best service, not by comparing each applicant to the top applicant.

Community 1		Community 2	
A	5,000 second service	B	7,500 second service
		C	11,000 second service

**ANALYSIS:** All applicants will proceed to point system comparison. All applicants are eligible for § 307(b) consideration. No dispositive § 307(b) preference can be awarded because, in the progression from A through C, no applicant exceeds the next best applicant by at least 5,000 people. A is not eliminated even though its proposal is more than 5,000 people inferior to C ( $11,000 - 5,000 = 6,000$ ) because it is not clear who will represent Community 2, and if B were to prevail, B would not be superior to A with respect to § 307(b).

### **EXAMPLE 5:**

**PRINCIPLE ILLUSTRATED:** First and second service totals are aggregated for the purpose of establishing eligibility for the § 307(b) preference.

Community 1/Applicant A		Community 2/Applicant B	Community 2/Applicant C
First Service	3,000	0	100
Second Service	2,500	5,000	500

**ANALYSIS:** Applicants A and B are compared using the point system. Applicants A and B are eligible for § 307(b) consideration, but C is not because even combined, C's first and second service level (600) is below the  $10\%/2,000$  people minimum. For purpose of initial eligibility, A can rely on its combined

new first and second service to meet the 10% threshold. (See FCC Form 340-Supplement, Worksheet #6, Lines 5 and 6). Applicant A would report this eligibility by answering "yes" to Question III(2) on the Form 340 Point Supplement (concerning second local service) and by providing an exhibit to that question showing that it is relying on its first and second service combined to establish eligibility. Neither A nor B meets the minimum first service threshold, and thus first service is not dispositive. Applicant A provides first or second service to 5,500 people (3,000 plus 2,500). Applicant B provides first or second service to 5,000 people. Thus A and B are equivalent. Had the group consisted only of A and C, however, A would have received a decisive § 307(b) preference because A would have been the only §307(b)-eligible applicant based on its first and second service aggregated for determining eligibility.

#### **EXAMPLE 6:**

**PRINCIPLE ILLUSTRATED:** If §307(b)-preferred new first or second service proposals specify the same community, the point system is used to determine the comparatively superior proposal.

	Community 1	Community 2	
	Applicant A	Applicant B	Applicant C
First Service	1,000	8,000	7,000
Second Service	5,000	0	6,000

**ANALYSIS:** Applicants B and C will be compared using the point system. All of the applicants are eligible for § 307(b) consideration by providing a first or second service to 10% of their populations. Applicant A is eliminated because, looking at first service alone, fewer than 10% of A's population receives new first service, in contrast to B and C which both provide an equivalent level of first service to 10% of their populations. The elimination of Applicant A eliminates Community 1 from consideration. The remaining applicants, B and C, both propose the same community. Section 307(b) analysis ends. The equivalent applicants B and C proceed to comparative consideration in a point system.